COURT OF APPEALS
DECISION
DATED AND FILED

July 15, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0898-FT

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

IN THE INTEREST OF ENCARNACION F., JR.,
A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

ENCARNACION F., JR.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Racine County: EMILY S. MUELLER, Judge. *Affirmed.*

NETTESHEIM, J. Encarnacion F., Jr., appeals from a ch. 938, STATS., dispositional order in which the juvenile court found him guilty of operating a motor vehicle without the consent of the owner contrary to § 943.23(2), STATS. Encarnacion argues on appeal that the State failed to prove owner nonconsent beyond a reasonable doubt because the owner of the vehicle,

Encarnacion's mother, did not testify at trial. However, we conclude that the juvenile court could reasonably and fairly infer from the circumstantial evidence that Encarnacion did not have the owner's consent to drive the car. Accordingly, we affirm the order.

Section 943.23(2), STATS., provides: "Whoever intentionally takes and drives any vehicle without the consent of the owner is guilty of a Class D felony." On appeal, Encarnacion challenges the sufficiency of proof on the issue of owner nonconsent. We therefore apply the following standard of review:

> [I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

State v. Poellinger, 153 Wis.2d 493, 507, 451 N.W.2d 752, 757-58 (1990).

At trial, the juvenile court heard testimony from Encarnacion's father and the arresting officer. Encarnacion's father testified that on May 17, 1997, he woke up at approximately 10:30 p.m. and discovered that the car was gone. When he looked for his extra keys, he discovered that they were missing as well. He assumed that Encarnacion had taken the car because his daughter had left earlier in the evening without it. Encarnacion's father testified that Encarnacion was sixteen years old and did not have a driver's license. He had not given Encarnacion permission to take his keys or to drive the car.

Encarnacion's father additionally testified that the car is owned by his wife, Estella, who has resided in Texas since 1986. He has been separated from her since 1991. Estella allowed her car to be taken to Wisconsin for her children's use. Encarnacion's sister makes payments for the car and Encarnacion's father mails the payments. When asked whether his wife had given Encarnacion permission to drive the car, Encarnacion's father replied, "I don't think—my wife doesn't live here so she couldn't give permission unless he talked to her on the phone or something, but I'm not aware of that."

The arresting officer testified that he apprehended Encarnacion at approximately 3:00 a.m. behind Encarnacion's residence. Regarding Encarnacion's explanation for operating the vehicle, the officer stated: "[Encarnacion] said the reason he took the car was because he couldn't get a ride to his friend's house which was north side of the City of Racine and that his sisters could not take him due to the fact they were going to the prom."

Encarnacion's mother and sister did not testify.

While recognizing that there was no direct testimony from Encarnacion's mother or sister that they did not give Encarnacion permission to use the vehicle, the court found that Encarnacion drove the vehicle without the consent of the owner. The court identified the question as whether, in the absence of direct testimony from the mother or sister, the facts established by the State proved beyond a reasonable doubt that Encarnacion operated the vehicle without the owner's consent. The court relied upon the following evidence in finding that he did: Encarnacion's father did not give consent; Encarnacion took the car key off of his father's key ring; Encarnacion did not have a key of his own and did not have a key from his sister "who could have given permission in that way"; and

Encarnacion did not have a driver's license. The court stated: "I simply don't believe that there is a scenario based on the evidence before me that would tell me that mother or sister would have given any permission for a boy with no driver's license to drive that car particularly under circumstances in which the way he was able to drive the car was essentially to steal the key off his father's key ring and then drive the car late at night."

The court found that "[b]ased on … the lack of the license, the method of getting the keys, father's testimony that he gave no permission, and all of the circumstances surrounding this, I do believe that the state has met its burden even in the absence of the direct testimony of no consent." Although Encarnacion seemingly objects to the juvenile court's reliance upon circumstantial evidence due to the lack of direct testimony from his mother, our supreme court has held that "owner nonconsent, like other elements of criminal offenses, may be proven by circumstantial evidence." ***State v. Lund***, 99 Wis.2d 152, 160, 298 N.W.2d 533, 537 (1980), *rev'd on other grounds by* ***State v. Poellinger***, 153 Wis.2d 493, 451 N.W.2d 752 (1990).

We must uphold the juvenile court's finding of guilt "[i]f any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt …." ***Poellinger***, 153 Wis.2d at 507, 451 N.W.2d at 758. Here, Encarnacion's mother lives in Texas and was not in Wisconsin when Encarnacion drove her car. Encarnacion did not have a key to her car so he took one from his father's key ring without his father's permission. Circumstantial evidence does not have to remove every possibility before a conviction can be sustained. *See* ***State v. Eberhardt***, 40 Wis.2d 175, 178, 161 N.W.2d 287, 289 (1968). Instead, the fact finder must be satisfied beyond a reasonable doubt or to a moral certainty of the truth of the fact. *See* ***id***. In making

this determination, the fact finder may draw inferences from the circumstances presented. *See* ***id***. We conclude that there was sufficient evidence before the court such that it could reasonably infer that Encarnacion operated his mother's car without her consent. Accordingly, we affirm.[1]

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.

[1] We note that the State argues on appeal that Encarnacion's father was an "owner" of the vehicle because it was in his possession on May 17, 1997. However, this argument was not presented to the juvenile court and the court's decision was not based on it. Although we could now decide the issue on this alternative ground, we choose to address the issue on the grounds relied on by the juvenile court. *See* ***State v. Bustamante***, 201 Wis.2d 562, 577 n.9, 549 N.W.2d 746, 752 (Ct. App. 1996) (we are free to examine a ground other than that relied on by the trial court if the alternative ground results in an affirmance).